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27777 7590 03/01/2006

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EXAMINER

SHEIKH, HUMERA N

ART UNIT

PAPER NUMBER

1615

DATE MAILED: 03/01/2006

Please find below and/or attached an Office communication concerning this application or proceeding.

|                              |                                      |                                       |  |
|------------------------------|--------------------------------------|---------------------------------------|--|
| <b>Office Action Summary</b> | <b>Application No.</b><br>09/938,454 | <b>Applicant(s)</b><br>COLLINS ET AL. |  |
|                              | <b>Examiner</b><br>Humera N. Sheikh  | <b>Art Unit</b><br>1615               |  |

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

#### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

#### Status

- 1) ☒ Responsive to communication(s) filed on 25 November 2005.
- 2a) ☐ This action is **FINAL**.                      2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

#### Disposition of Claims

- 4) ☒ Claim(s) 1-24 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-24 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

#### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

#### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All    b) ☐ Some \*    c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

  
HUMERA N. SHEIKH  
PATENT EXAMINER  
TC-1600

#### Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☒ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)  
Paper No(s)/Mail Date 11/25/05.

- 4) ☐ Interview Summary (PTO-413)  
Paper No(s)/Mail Date. \_\_\_\_\_
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other: \_\_\_\_\_

**DETAILED ACTION**

**Status of the Application**

Receipt of the Request for Continued Examination (RCE) under 37 C.F.R. §1.114, Applicant's Arguments/Remarks and the Information Disclosure Statement (IDS), all filed 11/25/05 is acknowledged.

The 35 U.S.C. §103(a) rejection of claims 1-24 over Shukuzaki *et al.* (US Pat. No. 5, 266,321) in view of Sunkel *et al.* (US Pat. No. 6,524,598 B2) has been withdrawn.

Claims 1-24 are pending in this action. No amendments to the claims have been made. Claims 1-24 are rejected.

***Continued Examination Under 37 CFR 1.114***

A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on 11/25/05 has been entered.

***Claim Rejections - 35 USC § 102***

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(e) the invention was described in (1) an application for patent, published under section 122(b), by another filed in the United States before the invention by the applicant for patent or (2) a patent granted on an application for patent by another filed in the United States before the invention by the applicant for patent, except that an international application filed under the treaty defined in section 351(a) shall have the effects for purposes of this subsection of an application filed in the United States only if the international application designated the United States and was published under Article 21(2) of such treaty in the English language.

**Claims 1-8 and 13-20 are rejected under 35 U.S.C. 102(e) as being anticipated by Collin (U.S. Pat. No. 6,491,931 B1).**

The instant invention is drawn to a mascara comprising a silicone gel that comprises an organopolysiloxane elastomer and a silicone oil, wherein said mascara comprises less than about 1%, by weight, of wax.

**Collin ('931)** discloses a make-up cosmetic composition for keratin fibers, such as mascara for application to eyelashes comprising at least one film-forming polymer in the form of particles in aqueous dispersion, wherein the at least one film-forming polymer is chosen from polyurethanes and fibers applied to keratinous fibers. A cosmetic composition comprising at least one film-forming polymer in the form of particles in aqueous dispersion, wherein the at least one film-forming polymer is chosen from polyurethanes, at least one wax and fibers applied to keratin fibers is also disclosed. A process for making up or caring for keratin fibers are also disclosed (see Abstract); (column 1, lines 29-63); Examples 1-3.

In a first embodiment, the cosmetic composition comprises fibers and at least one film-forming polymer in the form of particles in aqueous dispersion, wherein the at least one film-forming polymer is a polyurethane (col. 1, lines 46-51). This cosmetic composition reads on Applicant's claims 13-20, which recite a mascara that does not comprise wax.

In another embodiment, the cosmetic composition comprises fibers, at least one film-forming polymer in the form of particles in aqueous dispersion, and at least one wax, wherein the

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film-forming polymer is a polyurethane (col. 1, lines 52-56). The composition, which can comprise a wax, contains wax generally in an amount ranging from *0.5% to 40%* by weight, relative to the total weight of the composition (col. 4, lines 28-38). The composition can comprise, in one embodiment, an amount of waxes (I) generally ranging from *0.1% to 20%* by weight, relative to the total weight of the composition, and an amount of waxes (I) ranging from *1% to 10%* by weight in another embodiment (col. 4, lines 39-58) (also see claims 51 & 55). These amounts read on Applicant's claims 1-8, which recite a mascara comprising less than about 1%, by weight, of wax.

Oils disclosed in the invention that imparts transfer-resistance properties, *i.e.*, good staying power, include volatile and non-volatile oils such as hydrocarbon-based oils, silicone oils, fluoro oils and mixtures thereof (col. 6, lines 5-20).

Volatile oils which can be used include volatile silicones, such as, for example, cyclic volatile silicones. Cyclic volatile silicones disclosed include, for example, octamethylcyclotetrasiloxane, decamethylcyclopentasiloxane and hexadecamethylcyclohexasiloxane; and volatile linear silicones such as for example, octamethyltrisiloxane, heptamethylhexyltrisiloxane, heptamethyloctyltrisiloxane and decamethyltetrasiloxane. Volatile fluoro oils such as nonafluoromethoxybutane and perfluoromethylcyclopentane may also be used (col. 6, lines 34-44).

Non-volatile oils, including non-volatile hydrocarbon-based oils, silicone oils and fluoro oils are also disclosed. Suitable non-volatile silicone oils of low viscosity, such as linear polysiloxanes are disclosed and include for example, polydimethylsiloxanes (PDMSs), phenyl

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dimethicones, phenyl trimethicones and polyphenylmethyilsiloxanes (col. 6, line 55 – col. 7, line 48).

The cosmetic compositions can comprise pigments, such as for example, mica and coated mica (col. 8, lines 15-47).

According to Collin, the make-up composition has good staying power over time, is resistant to water, in particular while rubbing, imparts good lengthening and adhering properties to the eyelashes and coats them without forming blobs. In addition, the make-up composition does not crumble (col. 1, lines 29-45).

Examples 1-3 at columns 9-10 demonstrate various mascara compositions according to the invention. The mascaras obtained demonstrate good staying power, transfer-resistance and good lengthening properties to the eyelashes.

**Claims 1, 2, 5, 6, 9, 10, 13, 14, 17, 18, 21 and 22 are rejected under 35 U.S.C. 102(e) as being anticipated by Shah *et al.* (U.S. Pat. No. 6,387,405 B1).**

The instant invention is drawn to a mascara comprising a silicone gel that comprises an organopolysiloxane elastomer and a silicone oil, wherein said mascara comprises less than about 1%, by weight, of wax.

**Shah *et al.* ('405)** disclose cosmetic compositions, such as mascaras comprising an organopolysiloxane elastomer dispersed in a hydrocarbon vehicle. The cosmetic compositions also comprise a silicone gel, combined with a compatible cosmetically acceptable carrier wherein the silicone gel comprises the elastomer dispersed in the vehicle. The cosmetic compositions are transfer resistant and produce a soft and powdery sensation on the skin (see

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Abstract). The cosmetic composition comprising an organopolysiloxane elastomer dispersed in a hydrocarbon vehicle provide for long-lasting and unique tactile properties (col. 2, lines 8-30); (col. 4, lines 29-36).

The hydrocarbon vehicle can be a volatile or non-volatile hydrocarbon oil. The silicone gel is prepared by dispersing the organopolysiloxane elastomer in the hydrocarbon vehicle (col. 31-49). The gels combined with the carrier permit the production of soft-focus and matte-finish products without feeling heavy, greasy or oily, or caking or dragging on the skin caused by the addition of solids and fillers (col. 2, lines 56-65). Preferably the silicone gel is polysilicone-11 (col. 3, lines 27-44).

Volatile and non-volatile silicone oils and combinations thereof are disclosed at column 3, line 55 – column 4, line 6.

Volatile oils disclosed include, for example, cyclic and linear silicones, such as hexamethylcyclotrisiloxane, octamethylcyclotetrasiloxane and decamethylcyclopentasiloxane or volatile linear dimethylpolysiloxanes (col. 3, lines 64-67).

Non-volatile silicone oils disclosed include dimethicone, dimethiconol, phenyl trimethicone, simethicone, organomodified versions and mixtures thereof (col. 4, lines 1-6).

Film-forming agents are disclosed at column 4, lines 43-56. Film-forming agents improve the wear of the composition and can confer transfer-resistance to the makeup product. Examples of film-forming agents include natural waxes, polyethylene polymers, copolymers of polyvinylpyrrolidone, silicone resins and the like and may be present from about 0.1 to about 20% by weight of the composition.

Fillers are disclosed and include mica (col. 5, lines 30-34).

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The Examples at columns 5-7 demonstrate various cosmetic formulations of the invention. Example 1, for instance demonstrates a make-up formulation comprising cyclomethicone/trimethylsiloxysilicate, isododecane, silicone gel, nylon-12, barium sulfate, mica, dyes and pigment and aluminum starch octenylsuccinate.

***Claim Rejections - 35 USC § 103***

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

**Claims 1-24 are rejected under 35 U.S.C. 103(a) as being unpatentable over Sunkel *et al.* (US Pat. No. 6,524,598 B2).**

The instant invention is drawn to a mascara comprising a silicone gel that comprises an organopolysiloxane elastomer and a silicone oil, wherein said mascara comprises less than about 1%, by weight, of wax.

**Sunkel *et al.*** ('598) teach cosmetic compositions comprising organopolysiloxane elastomers and silicone oils wherein the composition may be in the form of a *mascara*, foundation, eye shadows, powders, blushers, lip color and the like (see reference column 2, lines 35-55); Examples, (particularly Example II); Claims 1, 13 and 20.

Silicone oils taught include *cyclomethicone* (see Examples). Film-forming agents taught include *polyurethanes* (col. 12, lines 8-11). Pigments, such as *mica* are listed at column 16, line 65 – col. 17, line 35. Exemplary organopolysiloxanes are taught at column 3, line 66 – col. 4, line 13.

Solidifying agents (*i.e.*, waxes; gelling agents) are taught and are present at a concentration of from about 0 to about 90% (col. 14, lines 55-65). This range of solidifying agents (*i.e.*, waxes) reads on Applicant's limitation of 'less than about 1%, by weight, of wax', recited in claim 1.

Example II at column 23 demonstrates a mascara composition comprising elastomer gels, silicone oils, pigments and the like. The mascara composition is applied to the lashes and/or eyebrows to provide softening, moisturization and conditioning.

The prior art explicitly teaches silicone gels comprised of organopolysiloxane elastomers, and silicone oils in mascara formulations. Applicants have not demonstrated any unexpected results, which accrue from the 'less than about 1%, by weight, of wax'. Sunkel *et al.* at column 14, lines 55-65, teach that solidifying agents (*i.e.*, waxes) are present at a concentration of from

about 0 to about 90%. Sunkel *et al.* also teach that most preferably the solidifying agents (*i.e.*, waxes) are present at from about 1% to about 15% (col. 14, lines 58-59). The '0%' as well as the 'about 1%' solidifying agents taught by Sunkel *et al.* meet the 'less than about 1%, by weight, of wax' instantly claimed. The prior art vividly recognizes the concept of employing no amounts (0%) as well as low amounts (about 1%) of wax in cosmetic formulations, including mascaras. Moreover, the prior art teaches that the particular solidifying agent for use in the cosmetic compositions will depend upon the particular type of composition desired, *i.e. gel or wax-based*, the desired rheology, the liquid base material used and the other materials to be used in the composition (col. 14, lines 50-55).

Therefore, it is the position of the Examiner, that given the teachings of Sunkel *et al.*, it would be *prima facie* obvious to one of ordinary skill in the art at the time the invention was made to use the specific cosmetic formulations of Sunkel *et al.* who teaches silicone gels comprised of organopolysiloxane elastomers, and silicone oils in mascara formulations comprising from about 0 to about 90% of solidifying agents (*i.e.*, waxes) to provide for an effective, long-wearing, low viscosity cosmetic composition. The expected result would be an improved, long-lasting mascara makeup product for application to keratinous fibers.

**Claims 1-24 are rejected under 35 U.S.C. 103(a) as being unpatentable over Collin (U.S. Pat. No. 6,491,931 B1) in view of Shah *et al.* (U.S. Pat. No. 6,387,405 B1).**

The instant invention is drawn to a mascara comprising a silicone gel that comprises an organopolysiloxane elastomer and a silicone oil, wherein said mascara comprises less than about 1%, by weight, of wax.

**Collin ('931)**, as delineated above, teaches a make-up cosmetic composition for keratin fibers, such as mascara for application to eyelashes comprising at least one film-forming polymer in the form of particles in aqueous dispersion, wherein the at least one film-forming polymer is chosen from polyurethanes and fibers applied to keratinous fibers. A cosmetic composition comprising at least one film-forming polymer in the form of particles in aqueous dispersion, wherein the at least one film-forming polymer is chosen from polyurethanes, at least one wax and fibers applied to keratin fibers is also disclosed. A process for making up or caring for keratin fibers are also disclosed (see Abstract); (column 1, lines 29-63); Examples 1-3.

In a first embodiment, the cosmetic composition comprises fibers and at least one film-forming polymer in the form of particles in aqueous dispersion, wherein the at least one film-forming polymer is a polyurethane (col. 1, lines 46-51). This cosmetic composition reads on Applicant's claims 13-20, which recite a mascara that does not comprise wax.

In another embodiment, the cosmetic composition comprises fibers, at least one film-forming polymer in the form of particles in aqueous dispersion, and at least one wax, wherein the film-forming polymer is a polyurethane (col. 1, lines 52-56). The composition, which can comprise a wax, contains wax generally in an amount ranging from *0.5% to 40%* by weight, relative to the total weight of the composition (col. 4, lines 28-38). The composition can comprise, in one embodiment, an amount of waxes (I) generally ranging from *0.1% to 20%* by weight, relative to the total weight of the composition, and an amount of waxes (I) ranging from *1% to 10%* by weight in another embodiment (col. 4, lines 39-58) (also see claims 51 & 55). These amounts read on Applicant's claims 1-8, which recite a mascara comprising less than about 1%, by weight, of wax.

Oils disclosed in the invention that imparts transfer-resistance properties, *i.e.*, good staying power, include volatile and non-volatile oils such as hydrocarbon-based oils, silicone oils, fluoro oils and mixtures thereof (col. 6, lines 5-20).

Volatile oils that can be used include volatile silicones, such as, for example, cyclic volatile silicones. Cyclic volatile silicones disclosed include, for example, octamethylcyclotetrasiloxane, decamethylcyclopentasiloxane and hexadecamethylcyclohexasiloxane; and volatile linear silicones such as for example, octamethyltrisiloxane, heptamethylhexyltrisiloxane, heptamethyloctyltrisiloxane and decamethyltetrasiloxane. Volatile fluoro oils such as nonafluoromethoxybutane and perfluoromethylcyclopentane may also be used (col. 6, lines 34-44).

Non-volatile oils, including non-volatile hydrocarbon-based oils, silicone oils and fluoro oils are also disclosed. Suitable non-volatile silicone oils of low viscosity, such as linear polysiloxanes are disclosed and include for example, polydimethylsiloxanes (PDMSs), phenyl dimethicones, phenyl trimethicones and polyphenylmethylsiloxanes (col. 6, line 55 – col. 7, line 48).

The cosmetic compositions can comprise pigments, such as for example, mica and coated mica (col. 8, lines 15-47).

According to Collin, the make-up composition has good staying power over time, is resistant to water, in particular while rubbing, imparts good lengthening and adhering properties to the eyelashes and coats them without forming blobs. In addition, the make-up composition does not crumble (col. 1, lines 29-45).

Examples 1-3 at columns 9-10 demonstrate various mascara compositions according to the invention. The mascaras obtained demonstrate good staying power, transfer-resistance and good lengthening properties to the eyelashes.

Collin does not teach polysilicone-11.

**Shah *et al.* ('405)** teach cosmetic compositions, such as mascaras comprising an organopolysiloxane elastomer, a hydrocarbon vehicle and a silicone gel, preferably polysilicone-11. The silicone gel (*i.e.* polysilicone-11) comprised of the elastomer dispersed in the hydrocarbon vehicle provides for a soft, stable, viscous gel or gel-like material (see reference column 3, lines 27-44).

It would have been obvious to one of ordinary skill in the art at the time the invention was made to incorporate the silicone gel, polysilicone-11 of Shah *et al.* within the make-up product of Collin. One of ordinary skill in the art would be motivated to do so with a reasonable expectation of success because Shah *et al.* teach polysilicone-11 in their cosmetic formulations (*i.e.*, mascaras) and they teach that polysilicone-11 is a preferred gel, which provides for a soft and stable cosmetic formulation having gel or gel-like properties. The expected result would be an improved and stabilized mascara product for coating keratinous fibers.

### ***Response to Arguments***

Applicant's arguments filed 11/25/05 have been fully considered but they are not persuasive.

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Firstly, Applicant argued regarding the 35 U.S.C. §103(a) rejection of claims 1-24 over Sunkel et al. ('598) stating, "Applicants submit herewith a Declaration under 37 CFR 1.132 by Ms. Lien Ly, who conducted a stability study comparing the stability for a period of 36 weeks on two mascara products. The first (Neutrogena® Weightless Volume Mascara – 'Wax-free Mascara') contained a silicone gel that includes an organopolysiloxane elastomer and a silicone oil and did not contain any wax. The second product (Neutrogena® Full Volume Mascara – 'Wax Mascara') contains about 11.5% by weight of waxes. Following 36 weeks of storage at 25 °C, the viscosity of the Wax Mascara increased on average by over one hundred percent, while the Wax-free Mascara unexpectedly only increased on average nineteen percent (five times less than the Wax Mascara)."

Applicant's arguments have been thoroughly considered, but were not found persuasive. The Declaration under 37 CFR 1.132 has been fully considered but was not deemed persuasive. Sunkel et al. teach '0 to 90% of solidifying agents, of which waxes are included. The 0% of solidifying agents (*i.e.*, waxes) reads on the less than about 1% of wax instantly claimed. Additionally, the 0% of solidifying agents (*i.e.*, waxes) also reads on Applicant's claims requiring no wax at all, such as is claimed in instant claims 13-24. The cosmetic (mascara) products of Sunkel et al. can comprise virtually no wax. The prior art initially recognizes and discloses make-up products, such as mascaras, which contain minute amounts or no amounts of wax at all. The newly cited Collin ('931) reference teaches cosmetic compositions, such as mascaras that can either comprise no wax at all or can comprise very small amounts of wax, such as 0.1% of wax (see col. 4, lines 39-58) (also see claims 51 & 55). Additionally, Shah et al. teach cosmetic compositions, such as mascaras, that may or may not contain wax components.

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The prior art explicitly demonstrate objectives for obtaining cosmetic compositions that incorporate no wax or less amounts of wax to avoid heavy or dragging feel of make-up upon application. Thus, Applicant's claim limitation of 'less than about 1%, by weight, of wax' does not impart any surprising or unexpected results, which result in a patentable distinction over the cited art of record.

Secondly, Applicant argued regarding the 35 U.S.C. §103(a) rejection of claims 1-24 over Shukuzaki et al. ('321) in view of Sunkel et al. ('598) stating, "Applicants have submitted the Declaration that demonstrates unexpected benefits with respect to the claimed invention."

Applicant's arguments have been fully considered, and were found persuasive. Accordingly, the 35 U.S.C. §103(a) rejection of claims 1-24 over Shukuzaki *et al.* (US Pat. No. 5, 266,321) in view of Sunkel *et al.* (US Pat. No. 6,524,598 B2) has been withdrawn.

### Correspondence

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Humera N. Sheikh whose telephone number is (571) 272-0604. The examiner can normally be reached on Monday through Friday from 8:00A.M. to 5:30P.M., alternate Fridays off.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Thurman Page, can be reached on (571) 272-0602. The fax phone number for the organization where this application or proceeding is assigned is (571) 273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications

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may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have any questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

Humera N. Sheikh

Patent Examiner

Art Unit 1615

February 16, 2006

*Humera N. Sheikh*  
*TC-1600*

*hns*